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OCTOBER TERM, 1980

No. 79-5903

H__ L__,

—v.—

HONORABLE SCOTT M. MATHESON, *et al.*,

ON APPEAL FROM THE SUPREME COURT
OF THE SATE OF UTAH

BRIEF OF AMICI CURIAE UTAH ASSOCIATION OF WOMEN AND UNITED FAMILIES FOUNDATION IN SUPPORT OF APPELLEES

LYNN D. WARDLE
J. Reuben Clark Law School
Brigham Young University
Provo, Utah 84602

ROBERT W. BARKER
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Attorneys for Amici Curiae

STEPHEN A. HILDEBRANDT
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Of Counsel

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STEPHEN A. HILDEBRANDT
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Of Counsel

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INTEREST OF THE AMICI

The Utah Association of Women (UAW) is a non-profit, non-partisan, non-sectarian association of women with 116 chapters and more than 1600 members in Utah. Believing that the family is the fundamental unit of society, the UAW and its members are dedicated to strengthening society by strengthening the family.

United Families Foundation (UFF) is a non-partisan, nationwide, non-profit research and education foundation associated with United Families of America. UFF was organized, in part, to "...educate the general public so that all will appreciate more fully the value of maintaining the family unit as the bedrock and strength of this nation, and [to] defend [the family] from all asaults that tend to fragment or weaken [it]..."

Many of the members of the UAW are mothers of teenage girls. They have a profound personal interest in seeing that this Court uphold their right to be notified so as to be able to counsel with their minor daughters in the event that they should become pregnant and choose to have an abortion.

The UAW and UFF believe that the issue presented in this case—whether or not a State legislature constitutionally may provide for parents to be notified before a physician performs a medically and psychologically significant abortion procedure on their unmarried minor daughter—is of extremely profound importance to all parents and families of adolescents. And while the State of Utah has its own interests in supporting the parental notification statute, the separate interests of parents and families also deserve careful consideration.

This brief is submitted as an aid to the Court in preserving valid traditional family relationships, which through time have proven of value to the individuals concerned and to society. Preserving the possibility of parental counsel to a troubled minor goes to the very heart of the family relationship upon which our society and nation are founded. Few would suggest that a minor would be deprived of her constitutional rights by a statute preserving the opportunity for counsel and guidance by the guardian of her property.

Denial of an opportunity for family counsel prior to an abortion is not necessary to preserve a minor's right to choose abortion.

The written consent of the Parties to the filing of this *amicus curiae* brief has previously been filed with the Clerk of Court pursuant to the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

The usual judicial deference to laws enacted by a State legislature, especially concerning domestic relations, is appropriate in this case. The Utah parental notification statute does not significantly burden the exercise of the right of abortion privacy. The right of privacy has never guaranteed to adults, let alone minors, the right to obtain abortions without notification to and consultation with *someone*. By merely requiring that the parents of a pregnant minor—the adults most interested in her well-being—will be notified and have an opportunity to counsel with her about her decision, the Utah law does not interfere with the minor's freedom to consult with other persons, if she so chooses. The statute does not give any third party a veto over the decision of the minor. Since notification of the parents is only required "if possible" the law is not absolute nor will it delay the performance of an abortion on a minor.

Even if an extraordinary standard of judicial review were appropriate in this case, the Court should uphold the parental notification requirement because it is sufficiently related to significant state interests. There is overwhelming evidence that parental notification substantially furthers the well-being of minors. It preserves a relationship that is essential to the development and well-being of adolescents. Parental notification is the golden "mean" between the undesirable extremes of abandoning adolescents and over-restricting them. Pregnant adolescents face especially grave physical and emotional risks from secret abortions, which are linked to patterns of subsequent "replacement" pregnancies and severe emotional distress. Giving parents the opportunity to counsel with their pregnant minor daughters protects adolescents against their vulnerability to the

guiles of their peers and other "friends". Parental notification also enables doctors to exercise their best medical judgment.

Parents are entitled to the support of the law in discharging their responsibility to guide and direct the upbringing of their children. The right of parents to participate, by giving counsel, in the abortion decision of their minor daughter is an integral part of the fundamental right of child-rearing which previous decisions of this Court have recognized. The requirement of parental notification compensates for the centrifugal forces that operate on parent-child relationships during adolescence.

Family integrity is protected by the Utah law. Communication and shared experiences are essential components for stable family relationships. Parental notification is the least intrusive way for the State to balance the interest of the minor, her parents and family. Family privacy is preserved; state intervention is avoided.

The parental notification law is not over-inclusive. The Constitution does not mandate state intervention, in the form of a state-enforced "mature minor" exception, in intra-family consultations nor is such an exception desirable. Giving a public officer the power to make the unavoidably indeterminate and subjective decision regarding the "maturity" or "best interests" of a particular minor only compounds the problem.

Finally, this Court needs to emphasize that the right of abortion privacy is not absolute and that the doctrine of abortion privacy is no license for federal judges to indiscriminately invalidate state laws insuring parental participation in the abortion decision of a minor.

ARGUMENT

I. THE UTAH PARENTAL NOTIFICATION LAW DOES NOT SUBSTANTIALLY INTERFERE WITH THE RIGHT OF ABORTION PRIVACY AND THEREFORE IS NOT SUBJECT TO JUDICIAL LIMITATION.

A. *The Utah Parental Notification Law Would Be Subjected To A Heightened Standard of Judicial Scrutiny Only If It Significantly Burdened The Fundamental Right of Abortion Privacy.*

The initial question that must be addressed in the course of a principled analysis of the issues in this case is whether or not the Utah parental notification law, Utah Code Ann. § 76-7-304(2) (1978), should be subjected to a heightened standard of judicial scrutiny. In *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, this Court manifestly indicated that legislation dealing with abortion will be subjected to a rigorous standard of judicial examination only if it "infringe[s]", *id.* at 156, "impinges upon" *Maher v. Roe*, 432 U.S. 464, 471 (1971); *Colautti v. Franklin*, 439 U.S. 379, 386 (1979), or "unduly burdens", *Bellotti v. Baird* (I), 428 U.S. 132, 147 (1976), *Maher v. Roe*, 432 US. at 473, 747, a woman's right to make the decision whether or not to have an abortion "free from governmental compulsion", *Maher v. Roe*, 432 U.S. at 473, *Whalen v. Roe*, 429 U.S. 589, 599, 600 (1977), or "free from unwarranted governmental intrusion". *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 n.11 (1976), quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In cases dealing with other aspects of the same "right of privacy", this Court clearly demonstrated that the degree of governmental intrusion which triggers judicial scrutiny occurs when the legislation "significantly interferes with", *Zablocki v. Redhail*, 434 U.S. 373, 383, 388 (1978), or "significantly burdens", *Carey v. Population Services International*, 431 U.S. 677, 689 (1977), the right of privacy. *See also Maher v. Roe*, 432 U.S. at 472-474. Accordingly, only if the Appellant established that the challenged Utah legislation "significantly interferes" with fundamental rights of minors would it be appropriate to apply an extraordinary standard of scrutiny. Appellant has failed to do so, and inasmuch as the Utah parental notification law does not significantly burden the exercise of constitutional abortion rights by minors, application of a rigorous or extraordinary standard of scrutiny in reviewing this statute is not warranted.

B. *The Right of Abortion Privacy Does Not Guarantee The Freedom To Obtain An Abortion Without Any Consultation Or Disclosure.*

There is no constitutional right to have a completely secret abortion. From its inception, the doctrine of abortion privacy has been predicated on the assumption that a qualified physician will be aware of, and participate in, the abortion decision. *Roe v. Wade*, 410 U.S. at 162-167. Adult women constitutionally may (should) be compelled to disclose the fact of pregnancy to, and obtain the assistance in the act of abortion of, a physician. *Connecticut v. Menillo*, 432 U.S. 9 (1975).

There is no constitutional right to make a completely private abortion decision. "The pregnant woman can not be isolated in her privacy." *Roe v. Wade*, 410 U.S. at 159. In the seminal abortion case, this Court emphasized that "consultation" between a physician and patient is expected to precede the abortion decision. *Id.* at 163. The mandatory informed consent law upheld by this Court in *Planned Parenthood v. Danforth*, required Missouri physicians to *inform* all pregnant women seeking abortions of "the options available and the physicial and psychological ramifications of choosing a particular course of action". *Planned Parenthood v. Danforth*, 392 F. Supp. 1378 (E.D. Mo. 1975), *rev'd in part* 428 U.S. 52 (1976). In approving of that requirement, this Court noted that the State concern that such information be provided to the woman before she made her abortion decision was "desirable and imperative." 428 U.S. at 67. Thus, the requirement of informed consent did not interfere with the constitutional right described in *Roe v. Wade*. 428 U.S. at 89, 90, (Stewart, J., concurring). In later cases this Court upheld other laws describing in even greater detail the information that a woman considering an abortion must receive before she can legally obtain an abortion. *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (summary affirmance); *Guste v. Jackson*, 429 U.S. 399 (1977) (per curiam). Thus, the requirement that adult women receive a minimum of consultation before they exercise their

right of abortion privacy does not interfere with that constitutional right.

In the light of the foregoing, it is not surprising to discover that this Court has never suggested that *minors* have a constitutional right to obtain abortions without consultation or notification. *See Planned Parenthood v. Danforth*, 428 U.S. at 75; *Carey v. Population Services International*, 431 U.S. at 693 (concurring opinion of Brennan, J.). Indeed, even the legislative scheme suggested by Justice Powell in his concurring opinion in *Bellotti v. Baird* (II), _ U.S. _, 99 S. Ct. 3035, 3048-3050 (1979), explicitly contemplated mandatory disclosure (to parents or a judge) before *any* minor, including a mature minor, could obtain an abortion. Therefore, it is clear that the Constitution does not mandate that the fifteen year old Appellant be able to obtain a secret abortion without consultation or notification.

C. *The Requirement of Parental Notification Does Not Interfere With A Minor's Right To Obtain Independent Advice And Consultation Regarding An Abortion.*

Since some disclosure and consultation does not interfere with or burden the constitutional right of abortion privacy, the question now before the Court does not concern *whether* mandatory disclosure and consultation is constitutionally permissible, but *to whom*. The critical issue is whether or not the Utah requirement that such disclosure be made to, and as a means of encouraging consultation with, a minor's *parents* significantly interferes with her constitutional right of privacy.[1]

In deciding this case, the Court need not decide that parents have an absolute constitutional right to counsel with their minor children before they obtain an abortion, or that the

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[1] The appellant in this case has alleged that she both notified and counselled with responsible adults before bringing her action seeking relief from the parental notification law. Complaint, paragraphs 7 and 9 (Appendix at 5), Appellants Brief at 3, 10-11.

constitutional doctrine of abortion privacy *requires* parental notification in the case of minors seeking abortions. Rather, the Court is asked only to reach the modest conclusion that a state *legislature* constitutionally *may* require parental notification before a physician performs an abortion on an unmarried minor.

Nor is any issue of minors' rights to seek counsel and services regarding family planning or abortion from non-parental sources implicated in the instant case. Compare *Doe V. Irwin*, _ F. 2d _, 48 U.S.L.W. 2587 (6th Cir. Feb. 26, 1980). The Utah parental notification law does not restrict consultation by a minor with professional counsellors. It does not give parents the *exclusive* right to counsel with their children. It only assures that *at least* the parents, the adults most interested in the ultimate welfare of each minor girl, will have the *opportunity* to counsel with their teenage daughter before she takes the irreversible and serious action of having an abortion. Inasmuch as notification and consultation with *someone* is constitutionally appropriate, and inasmuch as the Utah law is not exclusive or restrictive with respect to who that someone is, it does not substantially interfere with any consultation rights of minors.

D. *The Utah Parental Notification Requirement Does Not Significantly Interfere With A Minor's Personal Abortion Decision Or Her Access To Abortion Services.*

First, the requirement of parental notification does not conflict with the rationale for abortion privacy as stated by the Court in any prior decision. The Appellant and her *amici* have relied heavily on this Court's holding in *Planned Parenthood v. Denforth, supra,* that a Missouri parental consent requirement was unconstitutional. One obvious difference between the Utah law involved in the instant case and the Missouri law invalidated in *Planned Parenthood* is the difference between *consent* and *notification*. That difference is of profound significance for constitutional privacy analysis. *Planned Parenthood* did not suggest that parental participation in the abortion decision of a minor can not constitutionally be required. Rather, this Court

concluded that: "The fault with [Missouri law] is that it imposes a special *consent* provision, *exercisable by a person other than the woman* and her physician, as a prerequisite to a minor's temrination of pregnancy. . ." *428 U.S. at 75 (emphasis added).* The Court emphasized that "*the State does not have the constitutional authority to give a third party an absolute*, and possibly arbitrary, *veto* over the decision of the physician and his patient to terminat the patient's pregnancy...." *Id.* at 74 (emphasis added).

Likewise, the complicated Massachusetts scheme invalidated in *Bellotti v. Baird* (II), *supra*, required parental or judicial *consent* before a minor could obtain an abortion. As Justice Stevens observed in that case: "The differences between two statutes [Massachusetts and Missouri] are few...." 99 S. Ct. at 3054. Massachusetts, unlike Missouri, provided an alternative, a judicial proceeding, to minors whose parents would not consent to their abortions. "But in that proceedings, the Judge [was] afforded an *absolute veto* over the minors' decision, based on his judgment of her best interests." *Id.* (emphasis added).

The Utah parental notification statute does not compell a minor to obtain the consent of anyone before obtaining an abortion. The Utah parental notification statute does not give any third party a veto over the decision of the physician and patient to terminate the patient's pregnancy. The Utah parental notification statute does not disturb the holding of either *Planned Parenthood* or *Bellotti v. Baird* (II), nor does it conflict with the rationale for the doctrine of abortion privacy that has been articulated in the opinions of the Court rendered in *any* of the abortion cases.

Second, the Utah parental notification requirement is not "absolute". The statute provides that notification is required only if it is "possible", and the Utah Supreme Court has interpreted this to mean that parental notification is not required if "under the circumstances, in the exercise of reasonable diligence" the parents cannot be identified or located, or if it is not "feasible or practicable to give them notification. Furthermore, within the

context of what is reasonable under the circumstances, the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion." *H- L- v. Matheson*, 604 P.2d 907, 913 (Utah 1978) (also printed in Appendix at 57-58).

Third, the Utah parental notification law does not delay or chill the exercise of a protected constitutional right. Unlike the Massachusetts scheme invalidated in *Bellotti v. Baird* (II), there are no inherent procedural or administrative problems that would cause any delay in the minor's access to abortion. *See* 99 S. Ct. at 3054 (Steven, J., concurring). It does not add to the cost of an abortion. It does not entail the publication of any private facts about pregnancy. If a minor is embarrassed about her circumstances, it is extremely unlikely that her parents (if for no other reason that their own self-interests) would desire to broadcast the situation. And while the parents may want their daughter to see a trusted family physician or counselor, rather than an abortion clinic doctor or "counselor", this clearly lies within the scope of legitimate parental prerogatives and would not involve any more "publication" of private facts than if a minor had to seek such professional assistance "on the street" without any parental consultation.

The *amici's* argument that the Utah parental notification law delays access by minors to abortions because teenagers will hesitate to comply with that requirement, Brief of Amici Curiae Planned Parenthood Federation of America, Inc., et al., (hereinafter "Planned Parenthood Amici Brief") at 20, 21; Brief of Coalition for the Medical Rights of Women, et al., (hereinafter "Brief of Coalition") at 22 n. 15, severely strains the authority they have cited. The Department of Health Education and Welfare, Decision Memorandum (Schuck Report) (1977)[2] only indicates that delayed abortions are common among pregnant teenagers

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[2] The Schuck Report only disapproves of parental *consent* to *contraceptive* services (because "the adolescent must bear most of the risks and consequences of an unintended pregnancy," *id.* at 14) but does *not* reject parental *notification* of abortions. In fact, it *encourages* parental participation. *Id.* at Tab G.

and it was based on conditions *nationwide* not just in Utah where parental notification is specifically required.[3] *That* delay clearly does not result from Utah's requirement of disclosure to parents, but probably from the confusion and fear that normally accompany the delayed realization by a minor that she is pregnant. *See* Shouse *Psychological and Emotional Problems of Pregnancy an Adolescence*, in The Teenage Pregnant Girl, 161-68 (Zackler and Brandtadt eds. 1975); Martin *Psychological Problems of Abortion for the Unwed Teenage Girl*, 88 Genetic Psychology Monographs 23 (1973), cited in Planned Parenthood Amici Brief at 21. The authors of another study cited by *amici* suggested the reason for such delay: "Possibly, the young girl who has never experienced pregnancy, who is unfamiliar with pregnancy symptoms, and who also may have a poorly stabilized menstrual cycle is likely to delay in recognizing that she is pregnant." Bracken and Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am.J.Obstet. and Gynecol. 1008, 1012 (1975). They further observed that: "Recognition of pregnancy may be postponed because of denial, repression, negation or other . . . ego defense mechanisms." *Id.* at 1013. Moreover, the same authors also found that "delay is associated with a more distant relationship with significant others [e.g., parents or partners]." *Id.* at 1012. Thus, a requirement that a pregnant teenage girl must notify her parents may result in her obtaining an *earlier* abortion than if she is left to cope with the fear and confusion on her own. In any event, the studies cited do *not* support the bald assertion that the Utah parental notification law is responsible for (or will locally intensify) the phenomenon that teenagers generally delay seeking abortions.[4]

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[3] One writer suggests that only four states require parental notification before the performance of an abortion on a minor. Torres, *Does Your Mother Know . . . ?* 10 Fam.Plng.Perspectives 280 (1978).

[4] In fact, two authors cited by *amici* specifically questioned the assumption that "strict" laws had any significant correlation with delay in seeking abortion. Bracken and Kasl, *supra* at 1017.

The parental notification statute does not *cause* any delay in obtaining abortions by minors. It only requires notification and that could be completed immediately in every case. (Indeed, inasmuch as the Utah law requires *the physician* to notify the parents, assuming that the physician is responsible and competent, it will be done immediately.) Any delay in obtaining an abortion under the Utah law results from a minor's interruption of the statutory process of notification. That is apparently what occurred in the case at bar: The fifteen year old Appellant went to a doctor seeking an abortion, was advised by him that he would have to notify her parents before performing the abortion, she would not let him do so, and he refussed to perform the abortion. Complaint, paragraphs 7 and 13 (Appendix at 4, 5). Thus, appellant asserts the non sequitur argument that she is "*prohibited* from obtaining the abortion she desires" by § 76-7-304(2) *because* that provision requires her doctor to notify her parents *"and she is unwilling to have him do so"*. *Id.* at paragraph 13 (emphasis added).

Fourth, the Utah law does not single out abortion for discriminatory regulation. Compared to the amount of parental participation required before a minor can obtain virtually any other medical service in Utah, *Planned Parenthood v. Danforth*, 428 U.S. at 80, 81, it is apparent that she has infinitely more freedom to obtain an abortion, for parental *notification* only is required for an abortion while parental *consent* is required for most other medical procedures performed on a minor (including tonsillectomy, treatment of ingrown toenails, and wart removals).[5] The argument that parental notification is not statutorily required before a minor obtains medical assistance for her pregnancy and childbirth, Utah Code Ann. § 78-14-5(4) (f) (1953), is disingenious. *Statutory* notification *obviously* will not

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[5] Medical treatment performed on a minor without parental consent could subject the physician to liability for malpractice or assault and battery under the common law, *see generally*, 61 Am.Jur.2d, Physicians and Surgeons, Etc., § 161 at 289 (1972); under civil statute, Utah Code Ann. § 78-14-5(4) (a) (1953); and possibly even under criminal statutes. *See* Utah Code Ann. § 76-5-102 (1978).

be necessary to achieve disclosure and an opportunity for parental counsel if an abortion is *not* performed.

Finally, the Utah parental notification law does not burden any exercise of the right of abortion privacy because it is substantively neutral. The statute does not require consultation with anti-abortion parents only. It neither prohibits nor requires parents to encourage (or discourage) abortion. It does not even suggest that the state discourages or encourages abortions for minors, only that the state favors parental participation in that decision by the minor. The statute is completely neutral on the question of how parents should counsel their children. Clearly there is no constitutional objection to the state encouraging parental involvement through such a neutral procedural device as the challenged parental notification requirement. *See Doe v. Bellin Memorial Hospital*, 479 F.2d 756, 759, 760 (7th Cir. 1973); *Jones v. Eastern Maine Medical Center*, 448 F.Supp. 1156, 1164 (D. Maine, 1978).

Inasmuch as Utah's parental notification statute does not significantly interfere with any constitutional rights, judicial limitation of this domestic relations provision would be inappropriate. As the Court observed in another abortion case:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.
>
> Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Maher v. Roe, 432 U.S. at 475, 476.

II. EVEN IF THE PARENTAL NOTIFICATION LAW INFRINGED UPON THE PRIVACY RIGHTS OF MINORS, UNDER THE STRICTEST STANDARD OF SCRUTINY THAT COULD BE APPLIED IT WOULD BE INVALID ONLY IF IT WERE NOT SUFFI-

CIENTLY RELATED TO ANY SIGNIFICANT STATE INTEREST.

Since the Utah parental notification law does not infringe upon minors' constitutionally protected abortion rights, judicial scrutiny under the ordinary standard of review is appropriate. The statute would be invalid only if it were arbitrary, capricious and did not logically further any legitimate state interest. *Dandridge v. Williams*, 397 U.S. 471 (1971); *Nebbia v. New York*, 291 U.S. 502, 537 (1934). This tolerant standard of judicial review is a necessary corollary of two fundamental premises of constitutional law: Faith in the democratic system (where the elective branches of government have very substantial responsibility for—and the need substantial discretion in—deciding important social and political questions) and commitment to federalism (the belief that the powers of government should be dispersed between the state and federal units and not concentrated in one or the other). This standard not only encompasses a presumption of constitutionality, *id.* at 538, but defers substantially to the judgment of elected state legislators regarding a permissibility of governmental ends and the appropriateness of particular legislative means. *Maher v. Roe*, 432 U.S. at 479, 480; *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963). Under this tolerant standard of judicial scrutiny Utah Code Ann. § 76-7-304(2) is not invalid for it reasonably advances legitimate state interests.

However, even if a heightened standard of scrutiny were deemed appropriate, *i.e.*, assuming for purposes of argument that it could be said that the Utah law unduly burdens the right of abortion privacy of minors, the strict scrutiny of the "compelling state interest" test would not apply. Rather, a middle standard focusing on "significant state interests" would be applicable.

Because of the special condition and disabilities of minority , statutes restricting the exercise of fundamental constitutional rights by minors are subject to less demanding standard of scrutiny than statutes restricting the exercise of the same rights by

adults. *Planned Parenthood v. Danforth*, 428 U.S. at 74; *Bellotti v. Baird* (II), 99 S. Ct. at 3043. In *Planned Parenthood*, all of the opinions conspicously avoided using the "compelling state interest" test in examining the Missouri parental consent law. In the opinion for the Court Justice Blackmun applied the "significant state interest" standard, 428 U.S. at 75. Likewise, the required nexus between interests identified and the statutory scheme employed to achieve them, in the context of minors, was described as "*likely* [*to*] *enhance*", 428 U.S. at 75 (Blackmun, J., for the Court).[6]

In *Carey v. Population Services International*, Justice Brennan, writing for himself and four other members of the Court, indicated that a statute burdening the exercise of fundamental privacy rights by a minor would be invalidated if the state failed to produce evidence ("more than a bare assertion") that the statute was "a *rational means* for the accomplishment of some *significant state policy*...." 431 U.S. at 696. He further explained the reasons for the middle-level "significant state interest" test utilized in that case and in *Planned Parenthood.*

> This test is apparently *less rigorous than the "compelling state interest" test* applied to restrictions on the privacy rights of adults ... Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children..., and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," ... and the law has generally regarded minors as having a lesser capability for making important decisions....

431 U.S. at 693 n.15 (citations omitted) (emphasis added).

Thus, a middle standard of scrutiny is appropriate when reviewing legislation that infringes upon the constitutionally

[6] The conspicous absence of any reference in *Planned Parenthood* to the "narrowly drawn" or "necessary" nexus required under the "strict scrutiny" test, Roe v. Wade, 410 U.S. at 155, rebuts the suggestion of *amici* that such a rigorous test aplies in the context of the intermediate standard of review. Brief of Coalition at 34 citing *Zeblocki v. Redhail, supra* (which concerned the privacy rights of *adults* to marry).

guaranteed privacy rights of minors. Under this standard, the first concern is whether or not the state interests ostensibly served by the statute are "significant" (i.e., more than merely "legitimate", but not necessarily "compelling"). The second concern is whether or not the legislation enacted is "sufficantly related to" (i.e., more than merely "rationally" related, but necessarily "narrowly drawn" or "necessary" to effectutate) those significant state interests.

Since the highest standard of scrutiny that could be applied if the Utah parental notification statute infringed upon the privacy rights of minors would be this middle level "significant interest" standard, and since the parental notification law of Utah clearly satisfies even that standard of examination, the remainder of this brief will examine the Utah law under that standard. But this is done solely for the purpose of argument, and it bears repeating here that the Utah law does *not* infringe upon any constitutionally protected rights of minors.

III. UTAH HAS SIGNIFICANT AND WELL-RECOGNIZED STATE INTERESTS IN PROTECTING THE WELL-BEING OF MINORS, IN PRESERVING PARENTAL RIGHTS, AND IN SUPPORTING FAMILIES.

The interests protected by the Utah parental notification law are numerous[7] and significant. The Utah parental notification law represents a deliberate and reasonable balancing and accomodation of the major potentially conflicting concerns that exist when an unmarried minor becomes pregnant. As such, it substantially furthers well-recognized and significant state interests in protecting the well-being of minors, in preserving parental rights, and in supporting families and family privacy.

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[7] Appellant's suggestion that the interests to be considered are only those spelled out in the provision itself is wholly without merit. *See Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 153 (1938).

First, it has long been recognized that states have a profound interest in enacting laws to protect the well-being of minors. See. e.g., Sturges and Burn Manufacturing Co. v. Beauchamp, 231 U.S. 320, 325 (1913); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Going beyond even the common law,[8] this Court has repeatedly acknowledged that states' have a great and legitimate interest in enacting laws to protect the well-being of minors. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Indeed, in *Planned Parenthood v. Danforth*, this court acknowledged that a state's interest in protecting minors in the abortion context was truly a significant interest (the defect in the Missouri mandatory *consent* law being that it was not sufficiently related to this profound interest). 428 U.S. at 74, 75.

Second, the state's interest in preserving the fundamental rights of parents to raise their children is well established in constitutional law In *Meyers v. Nebraska*, 262 U.S. 390 (1923) the Court declared that the Fourteenth Amendment sheltered "not merely freedom from bodily restraint but also the right of the individual ... to marry, establish a home and *bring up children*...." *Id.* at 39 (emphasis added). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a state law requiring that all children be sent to public school was declared by the Supreme Sourt to be unconstitutional because it "unreasonably interefere[d] with the liberty of parents and guardians *to direct the upbringing and education of children under their control*.... The child is not the mere creature of the state; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*" *Id.* at 534, 535 (emphasis added). Even in *Roe v. Wade*, the Court emphasized that the same constitutionally protected right of privacy which sheltered the abortion decision of pregnant women also guaranteed to parents the right to raise their own children. 410

[8] The traditional basis for governmental protection of minors is the state's *parens patriae* power. *See* Clark, *The Law of Domestic Relations in the United States* §17.1 at 572 n.3 (1968); Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195.

U.S. at 153, 153. Most recently, in *Parham v. J. L.*, _U.S._, 99 S. Ct. 2493 (1979) this Court unequivocally reaffirmed the importance of the state's interest in supporting parental authority in childrearing, even as against the substantial interests of adolescents in judicial due process and personal health autonomy. *See also,* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U.L.Rev. 60a5, 613, 616; Note, *Parent Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird*, 52 So.Cal.L.Rev. 1869, 1876-1888 (1979).

Third, the state's interest in supporting the family and protecting family privacy are equally profound. It is now well established that "freedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 (1974). Family relations have been described as being "as old and as fundamental as our entire civilization", *Griswold v. Connecticut*, 381 U.S. 479, 495-496 (1956) (Goldberg, J., concurring), the family as being "basic in the structure of our society", *Ginsberg v. New York*, 390 U.S. at 639, and family life as "something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right". *Poe v. Ullman*, 367 U.S. 497, 551, 552 (1961) (Harlan, J., dissenting). As Justice Powell declared: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition". *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (Powell, J., concurring). Chief Justice Burger summarized the matter well when he observed, only a year ago, that: "Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course ..." *Parham v. J. L.*, 99 S. Ct. at 2493. *See also, Smith v. O.F.F.E.R.*, 431 U.S. 816, 862 (Steward, J., concurring); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Thus, there exist at least three extremely significant state interests served by the Utah parental notification law. Accordingly, the sole remaining question is whether or not there exists a sufficient nexus between those important interests and the requirement that parents be notified "if possible" before the performance of any abortion on their minor unmarried daughter.

IV. THE UTAH PARENTAL NOTIFICATION REQUIREMENT IS SUFFICIENTLY RELATED TO AND SUBSTANTIALLY FURTHERS SIGNIFICANT STATE INTERESTS.

A. *The Requirement Of Parental Notification "If Possible" Substantially Enhances The State's Profound Interest In The Well-Being Of Adolescent Girls.*

The rights of minors, of parents and of the State are not absolute. The interests of all three in assuming responsibility for the well-being of minors overlap and conflict, making some balancing an accomodation in the law necessary. The parental notification requirement is the best accomodation of these competing interests that is possible in the abortion context.

First, parental notification preserves a relationship that is essential to the well-being of adolescents. The word "adolescence" comes from the Latin word meaning "to grow to maturity." E. Hurlock, Adolescent Developoment 2 (4th ed. 1973). Adolescence is a time of transition from the dependency of childhood to the independence of adulthood. "Guidance is essential if the transition is to be made successfully and with minimum psychological damage". *Id.* at 15. Unlimited freedom adds to the adolescent's already-present feeling of insecurity. *Id.* at 256. J. Gallagher, F. Heald and D. Garrell, Medical Care of the Adolscent 243 (3rd ed. 1976). But the need for independence (identity) from parents is the primary drive during adolescence and this conflicts with the need for parental direction. I. Josselyn, Adolescence 40 (1971). Conflict between parent and adolescent is

natural, necessary and reaches its peak when the adolescent is between 15 and 17. E. Hurlock, *supra* at 297.

Because of this conflict, parental relations with their adolescent daughter are the most important relations she has during this time. D. Ausubel, R. Montemayor and R. Sujian, Theory and Problems of Adolescent Development 483 (2nd ed. 1977); J. Horrocks, The Psychology of Adolescence 42 (2nd ed. 1962).

> Parents often provide the psychological terrain upon which the adolescent struggles to find himself. They, in spite of the adolescent's periodic rejection of them, are typically *the most important people in any individual's life during the period of maturation*.... Because parents are so important they are the people with whom the adolescent has the most conflictual relationships.

I. Josselyn, *supra* at 35. Conflict between parents and their adolescent daughters "is unpleasant, but it is a necessity if the adolescent is to develop a healthy maturity". J. Gallagher, et al., *supra* at 243; *see also* Miller, *Adolescents and Authority* in Adolescence The Crisis of Adjustment 74 (Meyerson ed. 1975).

The premature breaking or weakening of the bond between parents and adolescent will be detrimental to the developmental well-being of the adolescent. "Court or agency intervention [including family planning agencies, both public and private—LDW] without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his [or her] own right." Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 650 (1977). *See further* J. Goldstein, A. Freud and A. Solnit, Before The Best Interests of the Child 101-106 (1979). On the other hand, over-protection of the adolescent frustrates the necessary development of an independent identity. The requirement of parental notification of such a critical decision as the decision to have an abortion strikes the best possible balance between

premature abandonment of the adolescent, and over-restriction of the adolescent.

Second, parental participation is necessary because making a decision about abortion is extremely difficult for adolescents. It is difficult enough for adult women.[9] Adolescents have a *particular* need for adult guidance inareas in which they have no childhood experience to guide them. E. Hurlock, *supra* at 252. Ambivalence and confusion regarding the abortion decision are even greater for adolescents than they are for adult women.[10] Wallerstein, Kurtz, and Bar-Din, *Psychological Sequelae of Therapeutic Abortions in Young Unmarried Women*, 27 Arch.Gen. Psychiat. 828 (1972), reported that nearly 60% of the young women studied reported conflict regarding the abortion

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[9] Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 Fam.Plng.Persp. 150, 152 (1978), reported:

"Most women [studied] experienced their abortions with some degree of conflicting emotions.... The largest proportion of the 106 followed-up respondents (24%) reported that the hardest part of the experience was with contending with feelings of loss of a child (although the participating clinics stressed 'fetus' and avoided the word 'child'). Other women (14%) found making the decision the hardest part of the experience. Also difficult (for 13%) was waiting for the abortion to be performed.... Another group (11%) described loneliness as the most difficult part of abortion. A fifth group (7%) struggled with self-acceptance."

This study further noted: "For many, the abortion decision contradicted their perceptions about themselves." *Id.* Moreover, "Sixty eight percent reported experiencing anxiety symptoms between pregnancy and abortion; 48% reported depressive symptoms. Four months after the abortion, 14% reported anxiety symptoms; 13% depressive symptoms." *Id.*. at 152, 153.

[10] Horowitz reports:

> The decision to have an abortion was not an easy one.... One of the young women admitted getting off of the table at the abortion clinic before the procedure began. Another was not told that she was having an abortion and was confused about what was occuring....
>
> Attitudes about the acceptability of abortion also demonstrate the ambivalence of many [adolescents] who had abortions. Looking back to the time before the abortion, less than one-half approved of abortion at that time.... Less than one-quarter approved of it after the abortion.

Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework, 551, 557 (November 1978). *See further* Babikan and Goldman, *A Study in Teenage Pregnancy*, 128 Am.J.Psychiat. 755 (1971).

decision. For nearly 20% "a central emotional issue revolved primarily around *their deception of their families and the burden of secrecy*." *Id.* at 829 (Emphasis added.). They also reported that "an overwhelming number (specifically, 19 out of the 22) reported experiencing moderate to severe emotional distress during the period of the pregnancy." *Id.* The opportunity for parental guidance afforded by parental notification is substantially related to reducing these anxieties.[11]

Third, parental notification inviting parental participation in the decision process is extremely important because of the substantial risks associated with abortions for minors. Nearly one-third of all abortions (1.32 million total abortions in 1977, the last year reported) are performed on teenagers. *See* Teitze, *Teenage Pregnancies: Looking Ahead to 1984*, 10 Fam.Plng.Persp. 205 (1978); Forrest, Sullivan and Teitze, *Abortion in the United States, 1977-1978*, 11 Fam.Plng.Persp. 329 (1979). The physical health risks of abortions for minors are well-known to the Court.[12] The risk to the emotional and psychological well-being of the adolescent, however, may be even more profound. Studies of adolescents reveal that the risk of emotional problems are even more severe for them than they are for adult women.[13] One study reported that two-thirds of the

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[11] There is no little irony in Appellant's *amici* using the suicide argument in support of their assertion that parental notification ought not to be required, for isolation is the prime cause of suicide among adolescents, J. Gallagher, et at., *supra* at 244, and loneliness is one of the principal emotional problems encountered by women who obtain abortions. See footnote 9, *supra*.

[12] Abortion is associated with increased risk of complication in subsequent pregnancies. *See, e.g.*, Maine, *Does Abortion Affect Later Pregnancies?*, 11 Fam.Plng.Persp. 98 (1979); *Digest* 11 Fam.Plng.Persp. 39 (1979). In 1977, the last year for which statistics are currently available, 70% of all abortions were performed in non-*hospital* facilities. Forrest, et al., *supra* at 335. Case loads at abortion clinics are six to seven times higher than they are at hospitals. Forrest, Teitze and Sullivan, *Abortion in the United States, 1976-1977*, 10 Fam.Plng.Persp. 271, 276 (1978).

[13] Among women generally: "The ambivalence about pregnancy termination

(Footnote continued.)

adolescent pregnant patients "showed intense dependency needs". Babikian and Goldman, *A Study in Teenage Pregnancy*, 128 Am.J.Psychiat. 755, 759 (1971). Another study reported that nearly one-third of the *young* women who had abortions

> showed moderate to considerable decline in psychosocial functioning five to seven months postabortion as measured from the baseline of their reported adequate pre-pregnancy status. These young women, at initial follow-up, were suffering with a variety of specific symptoms of maladaptive behavior including *mild to moderate depressive episodes*, a variety of new physical complaints for which medical attention had not been sought,... difficulty in concentrating in school, *withdrawal* from previous social contacts, *lowered self-esteem* explicitly related to the pregnancy and abortion experience, *a newly begun promiscous pattern in relationships with men*, and regression to more infantile modes of relationships with parents. *These difficulties did not predate the pregnancy.*

Wallerstein, et al., *supra* at 830 (emphasis added). Adolescents with previous emotional difficulties "were found to be chronically distressed, in continued poor psychosociological health, and additionally burdened by the open, unassimilated pregnancy and abortion experience which they weemed unable to integrate." *Id.* at 831. The authors observed "that the young women in our study have only a 50% chance of having mastered the pregnancy and abortion experience to the point of adequate closure and reconstruction of the previous state of psychosocial

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(Footnote continued.)

continued after the procedure. Subsequent to their abortions, 65% of the women 'didn't know' if they would choose abortion again if unwanted pregnancy occurred. Only 22% believed they would do so; 13% stated they would have an unwanted child." Freeman, *supra* note 9 at 152. Four months after the abortion experience, 40% of the women studied "continued to be troubled or regarded their abortions as too upsetting to think about." *Id.* at 53. Seven percent of them said they regretted the abortion decision, and an additional six percent said that they would never have an abortion again. *Id.* Table 3.

functioning at five to seven months post-abortion." *Id.* They concluded:

> Our single most striking set of findings relates to the effects of the pregnancy and abortion experience upon *the younger adolescents in the 14-17 year age span.* Consequent symptom manifestations, even when only transient, tended to be *more dramatic and more severe* in this younger group.... Even more, we were struck by the more pervasive *long-range effects of the pregnancy and abortions experience upon these particular young women....* Overall it is clear that the pregnancy and abortion experience in the younger and less mature is *considerably heightened risk*, a point of potential major maturational skewing.

Id. at 832. *(emphasis added). See also* Perez-Reyes and Falk, *Follow-up After Therapeutic Abortion in Early Adolescence*, 28 Arch.Gen.Psychiat. 120, 124 (1973), and studies cited in Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551, 553 n.10 (1978).

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed. Horowitz, *supra.* A healthy adaptive mourning (successfully coping with the sense of loss) is tramatic enough.[14] However, non-adaptive or pathological mourning (failing to cope) is even more difficult.

> Typically, non-adaptive responses are exaggerations or the persistence of mourning reactions. Some of these reactions include the absence of mourning and continued inability to discuss the loss; persistent abnormal affective stages such as

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[14] Horowitz reports:

> The young woman's initial period of shock and denial of the loss is normally followed by reactions such as fantasising about the baby; expressing the need to see if it is possible to have another child; feeling guilty about her own role in the loss; feeling angry toward the hospital personnel, family, or the baby's father; and having somatic reactions. These responses are sometimes followed by a period of pain and despair, in which apathy is common. A teenager may show a lack of caring for herself and her future. This sometimes serves as punishment for her perceived role in the loss.

Horowitz, *supra* note 10 at 553.

> extreme and enduring anger, guilt, or depression; or new or exaggerated self destructive acting out.

Id. at 553. Less than one-fourth of the adolescents observed in the subject study completed the healthy adaptive mourning process. *Id.* at 155. "They tended to conceive again soon after the termination of the previous pregnancy. Many of the young women showed few mourning reactions, perhaps because of a fear of being overwhelmed by their responses and because few others supported their expression of these feelings." *Id.* at 558. The report concluded:

> Working through a loss is often a painful process, but failure to do so increases the likelihood that feelings about this loss will influence a young woman's feeling about herself, a subsequent child, and future separations and losses.... Working through a loss can be difficult, while become pregnant again may seem to be a simple solution. Young women need supportive help, help acknowledging and expressing their grief, if they are to take this more difficult route of dealing with their loss.

Id. at 559.

Adolescents who do not fully address this emotional problem face greater risk of subsequent pregnancy. "Conceiving again at a median of ... none and one-half months for the Abortion Group suggest that many may have had difficulty accepting the previous loss. Twenty five said that they purposely became pregnant again as a replacement of the previous loss. Thirteen did not admit planning the subsequent pregnancy, but avoided contraception even though they were aware of the consequences of doing so." *Id.* at 556. *See also id.* at 558, 559.

This may explain the phenomenon of the rising incidence of repeated abortions.[15] One study showed that 17% of the women under 18 who had abortions were pregnant again within one year.

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[15] In 1976 one-fourth of all abortions were repeat abortions. Teitze, *Repeat Abortions: Why More*, 10 Fam.Plng.Persp. 286 (1978). In 1977 the percentage was even higher. Forrest, et al., *supra* 10 Fam.Plng.Persp. at 334. The

(Footnote continued.)

Steinhoff, et al., *Women Who Obtain Repeat Abortions: A Study Based On Record Linkage*, 11 Fam.Plng.Persp. 30, 37 (1979). Another study showed that 41% of adolescents who had therapeutic abortions had resumed sexual intercourse six months later, more than two thirds of whom were then doing so without contraceptives. Perez-Reyes, et al., *supra* at 123. The implication of parental notification for this specific problem is explained by Horowitz:

> A major task of adolescence is the detachment from parental figures. *There are similarities between the course of this separation and the mourning process* [that follows abortion].... 'Normal adolescent mourning,' as Max Sugar calls the process of separating from parental figures, *makes adolescents vulnerable to other losses. Some loss of support to the adolescent ego and superego have already resulted from this process. With further losses, the threat to an adolescent's identity can be strong.*

Horowitz, *supra* at 552. (emphasis added). Abortion without parental notification involves a severe double "loss" for the adolescent whose compensatory response very often appears to be to become pregnant again.

In all events, that minors need emotional support during and after the abortion experience is obvious. Id. at 558, 559; Spaulding and Cavenar, *Psychoses Following Therapeutic Abortion*, 135 Am.J.Psychiatry 364 (1978); Butler and Fujita, *Abortion Screening And Counselling: A Brief Guide For Physicians*, 50 Post Grad.Med. 208, 212 (1971). *Compare* Furstenberg and Crawford, *Family Support: Helping Teenage Mothers to Cope*, 10 Fam.Plng.Persp. 322, 333 (1978) (describing the similar relationship between parental support and adolescent success in adjusting to keeping a child). The ability of

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(Footnote continued.)

percentage of teenagers obtaining abortions who previously have experienced an abortion is estimated to be 0% for girls aged 14 and under, and rises by 5% with every age-year until 25% of the teenagers aged 19 having abortions have previously had one or more abortions. Teitze, *supra* 10 Fam.Plng.Persp. at 205.

the adolescent to weather the crisis is substantially improved when parents participate in the decision process. Perez-Reyes, et al., *supra* at 120, 124. Parental notification will reduce the liklihood of the isolation of the minor during the difficult decision process, and is necessary if meaningful parental support is to be available during the post-abortion period of emotional adjustment.

Fourth, parental notification is necessary to protect minors against their "peculiar vulnerability". Bellotti (II), 99 S. Ct. at 3043. Pregnant teenage girls are particularly vulnerable to the guiles of self-appointed social reformers and the influence of their peers.

The list of *amici curiae* who have filed briefs urging that the parental notification law be declared unconstitutional underscores the point that the critical question in this case concerns *who* will be given the primary opportunity to counsel with minors, and dramatically suggests the very real *consequences* that will result if this Court nullifies the Utah law. *Amici* supporting Appellant include: The Planned Parenthood Federation of America, Inc., which operates 744 family planning clinics (some of which offer abortions) in 43 states and the District of Columbia (Brief of Planned Parenthood Amici at 2); the American Association of Sex Educators, Counselors and Therapists; the National Association of Social Workers, Inc., a "substantial portion of [whose] 80,000 members are employed in child welfare, in school social work and in family service agencies" (*id.* at 5); the American Public Health Association, with membership of over 50,000 "professional health workers and consumers" (*id.* at 4); the National Abortion Federation, "composed of both professional individuals and groups providing abortion services" (*id.* at 6). The members of these organizations are engaged in the business of offering counsel regarding abortion to pregnant women, including teenagers. Not surprisingly, they agree that mandatory abortion counselling is constitutionally appropriate (indeed necessary). But they insist that parents *must*, as a matter of constitutional law, be denied

any favored position (mandatory notification) in the competition over *who* will provide that counsel to pregnant adolescents. (In fact, they artfully imply that since they are experts whose judgment would not be warped by emotional attachments, they ought to be preferred over amateur, emotionally involved parents. They fail to recognize that the parents will be dealing with their daughter for years to come, long after the "professionals" have disappeared from the scene.)

Such "friends of the court" are as self-serving as they are well-motivated. The authorities cited in their own briefs evidence that invalidation of the parental notification requirement will give *them* the principal opportunity to consult with pregnant teenagers *who are naturally reluctant to consult with their own parents about such matters. See* Planned Parenthood Amici Brief at 19, *See further, infra* at page 30.

Moreover, the influence of *peers* on the abortion decision of an adolescent can be substantial. *See generally* E. Hurlock, *supra* at 75-77; J. Gallagher, et al., *supra* at 243; I. Josselyn, *supra* at 42, 43; Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am.Soc.Rev. 385 (1963). Peers are not only the most *frequent* source of sex information to adolescents, D. Ausubel, et al., at 387, but they frequently are the source of *misinformation* about abortion. Hanson, *Abortion in Teenagers*, 21 Clin.Obst. and Gynec. 1175, 1180 (1978). Thus, parental notification would provide the adults most interested in the ultimate well-being of adolescents the opportunity to protect them against false, misleading, prejudicial or harmful "advise" from their "friends".

Fifth, parental notification will enable the doctor to exercise his best medical judgment. This Court has emphasized that the physician should consider "all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Roe v. Wade*, 410 U.S. at 153. Adolescents generally will not be the best source of this relevant information. It is unlikely

that a 17 year old girl, much less a 14 year old, would have adequate memory of the details of her own medical history. The withholding of information regarding prior emotional and medical problems is another concern, expecially if the girl is afraid that by disclosing such information she might not be able to obtain the abortion she desires.

Thus, even though the medical profession routinely objects to legal regulation, physicians themselves strongly recommend that parents be involved when adolescents come to a doctor for an abortion. Hanson, *supra* at 1180, 1181; Butler and Fujita, *supra* at 212; American Academy of Pediatrics, *Pregnancy and Abortion Counselling*, 63 Pediatrics 920, 921 (1979); Perez-Reyes, *supra* at 126. *See further* J. Gallagher, *supra* at 52, 64. The benefits for the doctor and patient of parental participation in the abortion experience have been abundantly noted. *See* e.g., Butler and Fujita, *supra* at 212; Perez-Reyes, *supra* at 120, 124. With the majority of abortions now being performed in the unfamiliar surroundings of clinics and the like, where the mass-production techniques prevail, of which this Court is already familiar, *see Planned Parenthood*, 428 U.S. at 91, 92 n.2 (Stevens, J., concurring with Powell, J., joining), the requirement of parental notification, which invites parental medical input, substantially effectuates the state's interest in the well-being of minors.

Sixth, parental notification also provides a means of protecting minors against the brutalizing effects of participating in the killing of a human life. It is an established tradition in this country that minors do not have to serve in the armed forces. In fact, a minor can not voluntarily serve in the military without parental consent (or emancipation). 10 U.S.C. §1170 (1976). This may reflect a profound social sentiment that the young should not be exposed to the de-civilizing, anti-humanitarian effects of participating in the grisly work of killing. Parental notification may cushion the abortion experience for an adolescent and help to preserve the values of humanitarianism and respect for human life in future generations.

B. *The Requirement Of Parental Notification "If Possible" Substantially Advances The State's Significant Interest In Protecting Parental Rights.*

The Utah parental notification law strikes a perfect balance between the competing interests of the parent, the state and the child. It insures that the exercise of rights by one person will interfere in only a minimal way with the rights of others.

First, prior decisions have established that: (1) the right of parents to raise their own children has its source outside of government or positive law, *Smith v. O.F.F.E.R.*, 431 U.S. 816, 845 (1977); (2) the parent-child relationship is ordinarily outside the reach of the law, *Moore v. City of East Cleveland*, 431 U.S. 499, *Stanley v. Illinois*, 405 U.S. 645 (1972); (3) the right of parents to raise their children as they see fit is constitutionally protected, *Meyer v. Nebraska*, *supra*, *Pierce v. Society of Sisters*, *supra*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J. L.*, *supra*; and (4) the government (including judicial officers of the government) can only interfere with parental control of their children in exceptional cases where it is necessary to protect the health or safety of the child or of society. *Prince v. Massachusetts*, *supra*, Wisconsin v. Yoder, *supra*. In *Ginsberg v. New York*, the Court noted:

> Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'it is cardinal with us that the custody, card, and nurture reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply or hinder.' ... *The legislature could properly conclude that parents* and others ... who have the primary responsibility for children's well-being *are entitled to the support of laws designed to aid discharge of that responsibility* ...

390 U.S. at 639, 640 (emphasis added). Like the New York law upheld in *Ginsberg*, the Utah parental notification law is a proper and significantly valid method of providing support to parents charged with the responsibility of raising children.

Second, without the legal requirement of parental notification many adolescents will not notify their parents. The argument that parental notification is futile because children from "good" families will automatically seek parental counsel about an unexpected pregnancy is absurd. Adolescents *typically* perceive that their relationships with their parents are poor. E. Hurlock, *supra* at 297; Adams, *An Introduction To Understanding Adolescents*, in J. Adams, Understanding Adolescents 6 (1968). Adolescents' confrontations with their parents are pervaded with fantasies. Miller, *supra* at 74. Discussion with parents regarding sex-related problems is especially difficult for teenagers. R. Sorensen, *Adolescent Sexuality In Contemporary America* 67-79 (1973). When peer-parental cross-pressures arise for adolescents, they typically attempt to resolve (avoid) the conflict by simply not communicating with their parents. Brittain, *supra* at 390, 391. One sutdy cited by Appellant's Amici reported that 45% of the teenagers receiving contraceptive information and services were doing so without parental knowledge. Torres, *supra* at 281. Thus, if adolescents can get abortions without parental notification, *many will.* As the doctors associated with one clinic reported:

> *Almost without exception*, younger women did not like to tell their parents. They fear parental reactions of shame or disappointment or a threatening posture. Oftentimes, the fact of intercourse, which the pregnancy exposes, causes the gravest concern for parents and should be fully discussed. Clinical experience has shown that *openness with parents* about the predicament, especially if initiated by the patient, has a better chance of eliciting the emotional support, something the patient may desperately need.

Butler and Fujita, *supra* at 212 (emphasis added). *See Baird v. Bellotti*, 450 F.Supp. 997, 1012 (D. Mass. 1978) (Jullian, J., dissenting) (adolescent fears of parental rejection seldom realized).

Third, the right of parents to inculcate in their children moral values is one of the critical features of the constitutionally protected right of child-rearing. The inculcation of moral values by the parents is clearly at stake when a minor daughter

contemplates having an abortion. *See Roe v. Wade*, 410 U.S. at 116; *Bellotti v. Baird* (II), 99 S. Ct. at 3047. Communication between parent and child is essential to the inculcation of parental morals in adolescents. Strang, *The Transistion From Childhood To Adolescence* in J. Adams, *supra* at 38. The *real* moral dilemma of a pregnant adolescent presents a crisis for which only the most naive would say prior parental moralizing would be sufficient preparation. *See* Note, *supra* 52 So.Cal.L.Rev. at 1900. Moreover, while the process of developing cognition and independent judgment may be nearly complete by late adolescence, development of moral judgment is more difficult and is not as clearly early-age-correlated. *See* W. Kay, Moral Development 179 (1968); Note, *State Intrusion Into Family Affairs: Justification And Limitations*, 26 Stan.L.Rev. 1383, 1395, 1396 (1974). Thus, parental notification is substantially related to preserving the rights of parents to raise their adolescent children.

C. *The Requirement of Parental Notification "If Possible" Substantially Advances the Significant State Interest In Preserving Families And Family Privacy.*

Parental notification is the least intrusive method of balancing the interests of the minor, her parents, and the state. It is the best method of preserving family privacy.

First, communication and shared experiences are the two principal factors affecting the relationships between an adolescent and her family. E Hurlock, *supra* at 299, 300. Parental notification, with one simple requirement, enhances both interests and contributes to family solidarity.

Second, the need for the law to bolster and support family institutions is widely recognized.[16] The American family, as an

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[16] Berger and Neuhaus report:

> We oppose policies that expose the child directly to state intervention, without the mediation of the family. We are skeptical about much current discussion of children's rights—especially when such rights are asserted

(Footnote continued.)

institution, is under severe strain. Yet despite the challenges of modernity, the strength of the family, as a natural support system for individuals in crisis, is profound. *See* Furstenberg and Crawford, *supra* at 333. The benefit to the family of parental notification can best be summarized in the words used by distinguished sociologist Amitai Etzioni to endorse the concept of *spousal* notification before an abortion:

> The principal sociological rationale for requiring consultation with the spouse is to encourage an airing of the feelings between the couple *before* any irreversible action is taken. Husband and wife may not necessarily end up with the same views, but alienation resulting from one person taking an unilateral and clandestine step will be avoided.
>
> Our main point is that the law does not merely regulate our lives, it articulates and symbolizes our values and mores. In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, a future shared project of the family, is wholely and completely a 'private' matter for the woman to determine....

Etzioni, *The Husband's Rights in Abortion*, 12 Trial at 56, 58 (November 1976).

Third, one very strong but unspoken reason why this Court may have invalidated the spousal consent requirement is the historic judicial reluctance to supervise ongoing family relations. A parental *consent* requirement invites court involvement in domestic disputes. From this perspective, the argument that

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(Footnote continued.)

> against the family. Children do have rights, among which is the right to a functionally strong family....

P. Berger and R. Neuhaus, *To Empower People: The Role of Mediating Structures In Public Policy*, 20, 21 (1977). *See generally* Oliphant, *Abortion And The American Family: A Note On A Court Long Overdue*, ____ Human Life Rev. ____ (in press); B. Berger, The Family and Mediating Structures As Agents for Child Care in B. Berger and S. Callahan, eds., Child Care and Mediating Structures (1979).

there are less drastic alternatives to protect family and parental interests than a parental *consent* requirement makes good sense. However, the troubling dilemma of parental and family interests remains and it is difficult to brush those interests aside with a "let them eat cake" statement about the right of women to control their "own" bodies (*i.e.*, the bodies of their own unborn children). A mandatory parental *notification* requirement is the most practical solution. It provides meaningful protection for the interests of the family by giving the parents a voice, if not a vote, in the matter. By opening the channels of communication, and yet clearly giving the pregnant women the ultimate decision-making power, it operates to reduce the strain on family relations in an abortion situation. And it does this all without judicial intrusion upon family privacy!

V. THE UTAH PARENTAL NOTIFICATION LAW IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. *The Utah Parental Notification Requirement Is Not Unconstitutional For Failing To Exclude Mature Minors From Its Coverage.*

The Utah statute is not overinclusive because it does not exclude mature minors. Many significant state interests (including assuring a complete basis for the medical decision, inviting parental support for the minor's decision, sustaining family unity, preserving parental right-to-know, etc.) are served by the parental notification requirement irrespective of the "maturity" of the minor involved. Moreover, the statute must be judged by reference to characteristics typical of adolescents generally. *See Califano v. Jobst*, 434 U.S. 47 (1977).

The argument that the Utah parental notification requirement is unconstitutional because it fails to provide an exception for the "mature minor" begs the issue. Whatever merit there may be to the argument that a state requirement of parental *consent* is unconstitutional if it fails to contain an exception for mature minors does not exist when the state law merely requires parental *notification*. The decisions of this Court in both *Planned*

Parenthood, supra; and *Bellotti v. Baird* (II), *supra*, were predicated on the fact that the requirement of consent gave parents an *absolute veto* over the decision of their "mature" minor daughters. Parental notification is a *minimal* intrusion, the least possible intrusion short of giving "mature minors" an *absolute* right to secret abortions.

Futhermore, the requirement of a "mature minor" exception would violate the principle of family privacy. Without minimal procedural protections of notice and an opportunity to be heard, parents would be deprived of a fundamental right without due process. *Caban v. Mohammed*, ___ U.S. ___, 99 S. Ct. 1960 (1979) *See also Fuentes v. Shevin*, 407 U.S. 67 (1972). And if the protections were provided, family privacy would be sacrificed, as the judicial "umpire" intruded into the most private family council.

The ascertaining of "maturity" of a minor, like finding her "best interests," is objectively indeterminate. *Bellotti v. Baird* (II), 99 S. Ct. at 3048, n.23 (Powell, J., concurring, with three others joining); *see also id.* at 3054 (Stevens, J., concurring with three others joining). *See* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 L. & Contemp. Prob. 226, 257-261 (Summer 1975). The totality of factual information necessary to make such a decision is unavailable to a stranger-decision maker (*especially* if the parents are not permitted to participate in the proceeding). *See* Note, *supra* 52 So.Cal.L.Rev. at 1895-1897. Moreover, the standard of "maturity" is objectively indeterminate; there are simply scores of competing theories about maturation and development. *See e.g.*, Beller, *Theories Of Adolescent Development*, in J. Adams, Understanding Adolescence 70 (1968); B. Berger, *supra* note 16 at 4-6. Thus, the judge would be required to make the determination based upon his own subjective values and intuition. That is, the judge would be exercising the same *absolute unguided discretion* which the Court would be trying to prevent parents from exercising! *See also*, Goldstein, *supra* at 650, 664; Note, *supra* 24 Stan.L.Rev. at

1387; J. Goldstein, A Freud and A. Solnit, Beyond the Best Interests of the Child, 49-52 (1973).

B. *The Utah Parental Notification Law Is Not Unconstitutional Because It Fails To Exclude Children Of Abusive Parents.*

The simple response to the argument that the Utah parental notification law does not protect children of abusive parents is that other provisions of the Utah Code Ann. do so. *See e.g.*, Utah Code Ann. § 78-3a-29, § 78-3a-48, 78-3a-50, and 78-3b-6 (1953). The Utah parental notification requirement must be read together with these provisions.

Reference to these child protection provisions underscores the critical importance of balancing the interests at stake. For example, even though a child may be severely beaten and life-threatened, the State does not, and constitutionally can not, terminate parental rights without a modicum of due process (including at a minimum notice and an opportunity to be heard). *Stanley v. Illinois, supra.* Similarly, even though the beating and even killing of women who file for divorce by their husbands occasionally (but too often) happens, the law does not allow secret divorces. Instead, the law uses all devices at its disposal to protect the threatened woman (injunctions, orders for separate maintenance, contempt powers, etc.). The interests of children of abusive parents are of concern to Utah policy makers. But if we have a government of laws, and not just men, those interests must be protected within the parameters of fundamental fairness to the parents as well.

CONCLUSION.

Dissenting in *Roe v. Wade*, Mr. Justice Rehnquist warned that the application of substantive due process standards in the abortion context would embroil the Court in the inappropriate and improper task of examining legislative policies and passing on the wisdom of those policies in the very process of deciding whether challenged state abortion legislation could be upheld. 410 U.S. at 174. The cases dealing with the issues of parental consent and consultation are prime evidence of the accuracy of this prediction and of the perils of substantive due process. Applied in the context of the conflicting family interests involved, with which states are particularly concerned and competent and with which federal judges are notably unfamiliar, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), the abortion doctrine reaches the boundaries of its conceptual limits and encounters competing relationships which have not only received similar substantive due process protection, but which have a basis in history, culture and law which greatly antedates the judicially created abortion doctrine.

Certainly the Court had this in mind in *Roe v. Wade* when it specifically declined to include family law in its comprehensive model of abortion regulation. 410 U.S. at 165 n.67. Since that decision, however, *more than 30* federal court decisions have been rendered dealing with the subject of parental consent or consultation.[17] The last seven decisions, all rendered after *Bellotti v. Baird* (II), have *unanimously* disapproved of parental participation in various schemes and approaches.[18] Regrettably, *all* of these opinions are short on credible analysis and are characterized by the clap-trap application of misperceived abortion dogma. While the Opinions of this Court on the subject have drawn some very fine and subtle distinctions, it is apparent that the lower courts are much more impressed by what they think the Court is doing (applying *absolute pro*-abortion jural

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[17] These cases are listed in the Appendix attached hereto.

[18] *See* note 17, *supra*.

postulates) than by what the Court is saying (about *balancing* interests and *non*-absolutism).

The Utah parental notification statute marks the finest balance of competing interests that is possible in the context of a minor seeking an abortion. With *very* little inconvenience to minors' rights, it affords *a great deal* of protection to the rights and interests of others. The Court can do much to dispell erroneous and false notions about abortion absolutism by upholding the Utah statute. It should do so.

Respectfully submitted,

Lynn D. Wardle
Attorney for Amicus
Utah Association of Women

Robert W. Barker
Attorney for Amicus
United Families Foundation

Stephen A. Hildebrandt
Of counsel

Dated May 19, 1980.

CERTIFICATE OF SERVICE

State of Utah)
) ss
County of Utah)

I, Lynn D. Wardle, one of the attorneys for Amici Curiae, being a member of the Bar of the Supreme Court of the United States, do hereby certify that all parties required to be served have been served and that I have caused three copies of the foregoing brief to be served upon counsel of record for the Appellant and the Appellees in this case in accordance with Rule 33 of the Rules of Supreme Court of the United States by depositing the same this day in a United States Postal Service mailbox, with firstclass postage prepaid, addressed to the following:

David S. Dolowitz, Esq., Parson, Behle & Latimer, 79 S. State St., P.O. Box 11898, Salt Lake City, Utah 84147, Attorney for Appellant.

Paul M. Tinker, Esq., Assistant Attorney General, 236 State Capitol Bldg., Salt Lake City, Utah 84114, Attorney for Appellees

All done this 19th day of May, 1980.

Lynn D. Wardle

APPENDIX

THIRTY FOUR (34) FEDERAL COURT OPINIONS RENDERED SINCE *ROE V. WADE*, 410 U.S. 113 (1973) CONCERNING PARENTAL PARTICIPATION IN THE ABORTION DECISION OF A MINOR DAUGHTER.

A. Twelve (12) Decisions Rendered After *Roe*, But Before The Supreme Court Decisions in *Danforth* And *Bellotti* (I).

1. Coe v. Gerstein, 376 F.Supp. 695 (S.D. Fla. 1973) (parental consent requirement unconstitutional), *appeal dismissed*, 417 U.S. 279 (1974), *aff'd sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.* 428 U.S. 901 (1976).

2. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.* (parental consent requirement unconstitutional), 428 U.S. 901 (1976).

3. Baird v. Bellotti, 393, F.Supp. 847 (D. Mass. 1975) (parental consent statute unconstitutional), *vacated*, 428 U.S. 132 (1976), *on remand*, 428 F.Supp. 854 (D. Mass. 1977) and 450 F.Supp. 997 (D. Mass. 1978), *aff'd*, 99 S. Ct. 3035 (1979), *reh den.* 100 S. Ct. 185 (1979).

4. Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554 (E.D. Pa. 1975) (parental consent requirement unconstitutional), *aff'd mem in part and vacated and remanded in part*, 428 U.S. 901 (1976).

5. Foe v. Vanderhoof, 389 F.Supp. 947 (D. Colo. 1975) (parental consent requirement unconstitutional).

6. Doe v. Exon, 416 F.Supp. 716 (D. Neb. 1975) (parental consent statute enjoined).

7. Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973) (parental consent statute unconstitutional), *vacated*, 410 U.S. 950 (1973).

8. Wolfe v. Schroering, 388 F.Supp. 631 (W.D. Ky. 1974) (parental consent requirement unconstitutional), *modified*, 541 F.2d 523 (6th Cir. 1976).

9. Doe v. Zimmerman, 405 F.Supp. 534 (N.D. Pa. 1975) (parental consent requirement unconstitutional).

10. Planned Parenthood v. Danforth, 392 F.Supp. 1362 (E.D. Mo. 1975) (upholding parental consent requirement), *modified*, 428 U.S. 52 (1976).

11. Wulff v. State Board of Registration for Healing Arts, 380 F.Supp. 1137 (E.D. Mo. 1974) (upholding common law parental consent requirement), rev'd, 508 F.2d 1211 (8th Cir. 1974), *modified*, 428 U.S. 106 (1976).

12. Roe v. Rampton, 394 F.Supp. 677 (D. Utah 1975) (abstaining and upholding parental notification requirement), *aff'd*, 535 F.2d 1219 (10th Cir. 1976).

B. The Two Supreme Court Decisions Of 1976.

1. Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (parental consent requirement unconstitutional).

2. Bellotti v. Baird (I), 428 U.S. 132 (1976) (abstaining regarding parental or judicial consent requirement).

C. Twelve Cases Decided Between *Bellotti* (I) and *Bellotti* (II).

1. Doe v. Deschamps, 461 F.Supp. 682 (D. Mont. 1976) (declining to invalidate parental notification requirement).

2. Gary-Northwest Indiana Women's Services v. Bowen, 421 F.Supp. 734 (N.D. Ind. 1976) (parental consent statute unconstitutional), *aff'd mem.* 429 U.S. 1067 (1977).

3. Hoe v. Brown, 446 F.Supp. 329 (N.D. Okla. 1976) (parental consent requirement unconstitutional).

4. Abortion Coalition v. Michigan Department of Public Health, 426 F.Supp. 471 (E.D. Mich. 1977) (parental consent requirement unconstitutional).

5. Wynn v. Scott (II), 449 F.Supp. 1302 (N.D. Ill. 1978) (parental consent requirement unconstitutional), *appeal dismissed*, 99 S. Ct. 49 (1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

6. Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976) (parental consent provision unconstitutional).

7. Lady Jane v. Maher, 420 F.Supp. 318 (D. Conn. 1976) (enjoining enforcement of guardian consent statute), *aff'd*, 431 U.S. 926 (1976).

8. Floyd v. Anders, 440 F.Supp. 535 (D.S.C. 1977) (parental consent statute unconstitutional), *vacated*, 99 S. Ct. 1200 (1979).

9. Wynn v. Scott (1), 448 F.Supp. 997 (N.D. Ill. 1978) (parental consent requirement unconstitutional), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

10. Wynn v. Carey (2), 599 F.2d 193 (7th Cir. 1979) (parental consent statute unconstitutional).

11. Baird v. Bellotti (3), 450 F.Supp. 997 (D. Mass. 1978) (permanently enjoining parental or judicial consent statute), *aff'd*, 99 S. Ct. 3035 (1979), *reh den.* 100 S. Ct. 185 (1979).

12. Women's Services, P.C. v. Thorne, Civil No. 79-L-85 (D. Neb. April 20, 1979) (parental notification statute unconstitutional).

D. The Supreme Court Parental or Judicial Consent Decision Of 1979.

1. Bellotti v. Baird (II), 99 S. Ct. 3035 (1979) (requirement of parental or judicial consent unconstitutional), *reh den.* 100 S. Ct. 185 (1979).

E. Seven (7) Opinions Rendered Since *Bellotti (II)*.

1. Leigh v. Olson, Civ. No. A3-79-78 (D.N.D. July 9, 1979) (parental notification requirement unconstitutional).

2. Jones v. Smith, No. 79-6403-civ.-SMA (S.D. Fla. July 13, 1979) (parental consent requirement unconstitutional).

3. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio August 22, 1979) (parental consent and notice requirements unconstitutional).

4. Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542 (D. Me. 1979) (parental notification provision unconstitutional).

5. Women's Services, P.C. v. Thorne, cv 79-L-85 (D. Neb. October __, 1979) (permanently enjoining parental notification statute).

6. Charles v. Carey, No. 79-C-4541 (N.D. Ill. November 16, 1979) (parental notification requirement unconstitutional).

7. Margaret S. v. Edwards, No. 78-2765 (E.D. La. March 3, 1980) (parental notification requirement and separate parental consent requirement unconstitutional).

For further discussion of these cases and the overall federal court treatment of parental consent and parental notification requirements *see* L. Wardle, The Abortion Privacy Doctrine: A Compendium And Critique Of Federal Court Abortion Cases (Wm. S. Hein & Co.: in press).